

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

)	
In re:)	
)	CHAPTER 7
THE UPPER CRUST, LLC, et al., ¹)	CASE NO. 12-18134-HJB
)	
Debtors.)	
)	
MARK G. DEGIACOMO,)	
CHAPTER 7 TRUSTEE OF THE UPPER)	
CRUST, LLC et al.,)	ADVERSARY PROCEEDING
)	NO. 14-01163
Plaintiff,)	
v.)	
)	
JORDAN TOBINS and)	
STEFANY TOBINS,)	
)	
Defendants.)	
)	

**PRETRIAL STIPULATION, RULE 26(f) REPORT AND CERTIFICATION AND
JOINT PROPOSED DISCOVERY PLAN**

Pursuant to the Preliminary Pretrial Order of this Court dated May 6, 2015 (Docket No. 28) and Fed. R. Civ. P. 26(f), as made applicable to this proceeding by Fed. R. Bankr. P. 7026, the following parties conferred by telephone on July 1, 2015 at 10:00 a.m.: Ryan M. MacDonald, Esq. on behalf of Plaintiff Mark G. DeGiacomo, the Chapter 7 trustee for the bankruptcy estate

¹ The other Chapter 11 cases substantively consolidated with The Upper Crust, LLC (Case No. 12-18134) are The Upper Crust - Back Bay, LLC (Case No. 12-18135), The Upper Crust-Fenway, LLC (Case No. 12-18136), The Upper Crust-Harvard Square, LLC (Case No. 12-18137), The Upper Crust-Hingham, LLC (Case No. 12-18138), The Upper Crust-Lexington, LLC (Case No. 12-18139), The Upper Crust-State Street, LLC (Case No. 12-18140), The Upper Crust - South End, LLC (Case No. 12-18142), The Upper Crust - Pennsylvania Avenue, LLC (Case No. 12-18143), The Upper Crust - D.C., LLC (Case No. 12-18148), The Upper Crust - Waltham, LLC (Case No. 12-18144), The Upper Crust-Watertown, LLC (Case No. 12-18145), The Upper Crust-Wellesley, LLC (Case No. 12-18146), and JJB Hanson Management, Inc. (Case No. 12-18147) (collectively, the "Debtors").

of the Upper Crust LLC, et al. (the “Trustee” or “Plaintiff”), Richard Briansky, Esq. on behalf of Defendants Jordan Tobins (“Jordan”) and Stefany Tobins (“Stefany”), (Jordan and Stefany are collectively, the “Defendants”) (the Defendants and the Trustee are collectively, the “Parties”). In connection with the requirements set forth in the Preliminary Pretrial Order the Parties state as follows:

I. THEORY OF CAUSES OF ACTION AND/OR DEFENSES

A. Theory of Plaintiff's Causes of Action

In Counts I, III and V of the Trustee’s Adversary Complaint the Trustee is seeking to avoid certain transfers made to Jordan during the two and four year periods prior to the Petition Date² pursuant to 11 U.S.C. § 548 and M.G.L. c. 109A §§5(a)(2) and 6(a) (Massachusetts Uniform Fraudulent Transfer Act) in connection with the Trustee’s powers under 11 U.S.C. § 544(b). These transfers are summarized in Exhibits A and C to the Trustee’s Adversary Complaint. In Counts II, VII and IX the Trustee is seeking to recover the value of these transfers for the benefit of the bankruptcy estate under 11 U.S.C. § 550. The Trustee is seeking to avoid and recover the value of these transfers as fraudulent transfers on the basis that Jordan caused the Debtor to make these transfers to him for personal expenses, not compensation related to Jordan’s employment with the Debtors or attributable to the Debtors’ business operations.

In Counts IV and VI of the Trustees Adversary Complaint the Trustee is seeking to avoid certain transfers made to Stefany during the four year period prior to the Petition Date pursuant to M.G.L. c. 109A §§5(a)(2) and 6(a) (Massachusetts Uniform Fraudulent Transfer Act) in connection with the Trustee’s powers under 11 U.S.C. § 544(b). These transfers are summarized in Exhibits B to the Trustee’s Adversary Complaint. In Counts VIII and X the Trustee is seeking

² Capitalized terms not otherwise defined in the discussion of the Plaintiff’s Theories shall have the same meaning ascribed to such capitalized terms in the Trustee’s Adversary Complaint.

to recover the value of these transfers for the benefit of the bankruptcy estate under 11 U.S.C. § 550. The Trustee is seeking to avoid and recover the value of these transfers as fraudulent transfers on the basis that the transfers to Stefany were for payroll and benefits and Stefany preformed little or no services for the Debtors and the transfers to Stefany were not attributable to the Debtors' business operations or compensation for Stefany's purported employment with the Debtors.

B. Theory of Defendants' Defense

The Defendants maintain that the Trustee's claims are barred by the plain language of a settlement agreement among Jordan Tobins ("Jordan"), Stefany Tobins,, the Upper Crust, LLC (the "Upper Crust") who, with Joshua Huggard ("Huggard") and Brendan Higgins ("Higgins"). The Defendants contend that the specific language selected by the parties and incorporated in the Settlement Agreement manifests an unequivocal intent to discharge and terminate "any and all" "claims" "known or unknown," "direct or derivative" which the Upper Crust (and Huggard and Higgins) "now have" or "ever had" against the Tobins.

Moreover, Jordan and Stefany contend that the Trustee has no evidence to support any of the claims against either of them but rather that any alleged transfer was for fair and reasonable consideration including payment for labor provided to the Debtors.

C. Theory of Defendants' Counterclaims

The Defendants assert that Mark G. DeGiacomo, the Chapter 7 Trustee of the estate of the Upper Crust (the "Trustee") ignored the terms of the Settlement Agreement and filed an adversary proceeding asserting the same claims (i.e. diversion of proceeds) against the same parties (Jordan and Stefany) that the Upper Crust previously released. By this Action, the Tobins seek their damages as a result of the Trustee's breach of the Settlement Agreement and equitable

relief in the form of an order requiring the Trustee to specifically perform under the Settlement Agreement.

D. Theory of Plaintiff's Defenses to Defendants' Counterclaims

The Trustee has asserted that the Defendant's Counterclaims fail to state a claim upon which relief can be granted. The Defendants' Counterclaims rest on the assumption that the release and covenant not to sue contained in the purported prepetition Settlement Agreement and Mutual Release dated July 31, 2012 (the "Settlement Agreement") is enforceable. The Trustee asserts that the Defendants' counterclaims fail because the Settlement Agreement, while executed by all parties, was never consummated and therefore, the release and covenant not to sue provided therein cannot form the basis of the Defendants' contract claims and M.G.L. c. 93A claim. In addition, even if the Settlement Agreement was consummated prepetition, Counts I and II of the Defendants' counterclaim fail to state a claim because the Defendants cannot establish any recoverable damages. Moreover, the Defendants' Chapter 93A claim against the Trustee in Count III of the Defendants' counterclaim also fails because the Defendants' cannot meet their burden that the Trustee was engaged in trade or commerce for purposes of M.G.L. c. 93A as there was no commercial relationship between the Trustee and the Defendants because here the Parties contact occurred only in the context of litigation. See e.g. In re Inofin Inc., 512 B.R. 19, 92 (Bankr. D. Mass. 2014). The Trustee reserves his right with respect to assert further defenses that may arise in the context of discovery.

II. CONTENTIONS OF FACT

A. Stipulated Facts.

1. On October 4, 2012, the Debtors filed voluntary petitions pursuant to Chapter 11 of the United States Bankruptcy Code (the "Petition Date").

2. On November 7, 2012, the Trustee was appointed as the Chapter 11 Trustee of the Debtors' jointly administered cases.

3. On March 6, 2013, the Court entered an order converting the Debtors' jointly administered cases to Chapter 7 and the Trustee was appointed as the Chapter 7 Trustee of the Debtors' jointly administered cases.

4. In or around 2005, Jordan, Joshua Huggard ("Huggard") and Brendan Higgins ("Higgins") formed Upper Crust, LLC. The Upper Crust was the sole member of the other Debtors.

5. Before the Petition Date, Jordan formed Coletrain, Inc. ("Coletrain") and Coleman, Inc. ("Coleman"). Coletrain and Coleman are non-debtors (collectively, the "Non-Debtor Entities").

6. On or about, April 5, 2012, the Debtors and Huggard, Higgins and Cocobling, filed an complaint against Jordan, Stefany, Coletrain, Coleman and the Debtors' former accountant, David Marcus, in Massachusetts Superior Court, Suffolk County, C.A. No. 12-1346 (the "State Court Action").

7. A copy of the State Court Action is attached as **Exhibit A**.

8. The Debtors, Jordan, Stefany, Huggard, Higgins, Hurley and the Non-Debtor Entities (collectively, the "Settlement Parties") signed the Settlement Agreement. A copy of the Settlement Agreement is attached as **Exhibit B**.

9. Paragraph 18 of the Settlement Agreement provided, in relevant part that

Tobins will pay or cause to be paid, by cash, bank check or wired funds, \$250,000 to the Upper Crust, said payment to be made no later than October 1, 2012 (the "Closing Payment") and shall be made to an account or payee as designated by the Upper Crust in writing. Upon receipt of said Closing Payment: . . .

10. On or about September 28, 2012, Jordan caused Ditmars Limited (“Ditmars”) to pay on his behalf \$250,000 to the Debtors by wire to counsel to Debtor’s counsel pursuant to paragraph 18 of the Settlement Agreement.

11. After the Debtors received the \$250,000 settlement payment, the State Court Litigation was not dismissed with prejudice.

12. The plaintiffs in the Pinto Litigation filed a proof of claim in the Debtors’ cases dated June 26, 2013 in the amount of \$3,069,590.00 and identified as Claim No. 51 on the Debtors’ Claims Register.

13. The DOL filed a proof of claim in the Debtors’ cases dated April 26, 2013 in the amount of \$883,481.52 and identified as Claim No. 2 on the Debtors’ Claims Register.

B. Contested Facts Asserted by the Plaintiff

14. During the period of October 4, 2008 through the Petition Date, the Debtors transferred, other than salary, a total of \$1,372,592.00 to or for Jordan’s benefit (the “Four-Year Transfers to Jordan”).

15. Between October 4, 2010 and through the Petition Date, the Debtors transferred, other than salary, a total of \$406,328.00 to or for Jordan’s benefit (the “Two-Year Transfers to Jordan”).

16. The Four-Year Transfers to Jordan and Two-Year Transfers to Jordan were used by Jordan to pay for personal real estate or other personal expenses such as hotels, travel and dining which were not attributable to the Debtors’ business operations or to reasonable compensation for Jordan’s employment with the Debtors.

17. During the period of October 4, 2008 through the Petition Date, the Debtors transferred a total of \$49,934.00 to Stefany (the “Four-Year Transfers to Stefany”), an alleged employee of the Debtors who actually performed little or no services for the Debtors.

18. The Four-Year Transfers to Stefany were made to or for Stefany’s benefit to pay personal expenses and to pay health insurance premiums for coverage to which she was not entitled. These transfers were not attributable to the Debtors’ business operations or to reasonable compensation for Stefany’s employment with the Debtors.

19. The Debtors received less than the reasonably equivalent value in exchange for (i) the Four-Year Transfers to Jordan; (ii) the Two-Year Transfers to Jordan; and (iii) the Four-Year Transfers to Stefany.

20. The Two-Year Transfers to Jordan and the Four-Year Transfers to Jordan were made for the benefit of an insider and outside the ordinary course of business.

21. Jordan was the transferee for whose benefit the Two-Year Transfers to Jordan and the Four-Year Transfers to Jordan were made.

22. Stefany was the transferee for whose benefit the Four-Year Transfers to Stefany were made.

23. The Four-Year Transfers to Stefany were made for the benefit of an insider.

C.. Contested Facts Asserted by the Defendants

24. All alleged transfers in the Adversary Proceeding were for full and fair consideration.

25. The transfers represented among other things compensation to Jordan and Stefany.

26. Stefany worked for the Debtors and provided valuable services for which she was entitled to compensation.

27. The Settlement Agreement precludes the Trustee's claims.

III. DISCOVERY PLAN PURSUANT TO FED. R. CIV. P. 26(f)

A. Certification

Undersigned counsel certify that they have considered the nature and basis of the Parties' claims, counterclaims and defenses and possibilities for achieving a prompt settlement or other resolution of the case and have developed the following proposed discovery plan. Counsel further certify that they have forwarded a copy of this report to their clients.

B. Discovery Plan

JOINT PROPOSED DISCOVERY PLAN

1. Initial Disclosures. The Parties have served each other with initial disclosures pursuant to Rule 26(a)(1).

2. Amendments To Pleadings. The Parties do not expect to seek any further amendments to the Pleadings.

3. Discovery Plan. The Parties' proposed joint discovery plan includes all topics covered by Rule 26(f), and provides that:

- (a) All fact discovery, including answers to interrogatories, requests for production of documents and request for admissions shall be served so that all responses will be due on or before October 15, 2015;

(b) Reports from experts as required by Fed. R. Civ. P. 26(a)(2) shall be issued by the party with the affirmative burden of proof by November 15, 2015. Any rebuttal expert reports shall be issued by December 15, 2015. All expert depositions must be noticed and completed by January 15, 2016;

(c) Any case dispositive motions, pursuant to the Federal Rules of Civil Procedure, shall be served and filed with the Court on or before January 30, 2016. Replies shall be filed within twenty (20) days of service of the motion, and surreplies, if any, shall be filed within ten (10) days of receipt of a reply

(d) At this time there are no issues regarding disclosure or discovery of electronically stored information; the Parties have agreed to produce electronically stored information, such as emails, in .pdf (portable document format) form;

(e) At this time, the Parties do not anticipate any issues regarding claims of privilege or of protection as trial-preparation materials;

(f) Pursuant to Fed. R. Civ. P. 26(f)(3)(F), the Parties do not request that the Court enter any other orders at this time

(g) Pursuant to Fed. R. Civ. P. 26(f)(3)(E) the Parties request that no changes should be made to the limitations on discovery imposed under the Federal or Local rules. The Parties also agree that discovery will be needed on, but not limited to, the following subjects:

- i. The Jordan Two-Year Transfers;
- ii. The Jordan Four-Year Transfers;
- iii. The Stefany Four-Year Transfers;

- iv. The State Court Action;
- v. The Settlement Agreement in the State Court Action;
- vi. The satisfaction of conditions and obligations in the Settlement Agreement;
- vii. The elements of the Plaintiff's claims;
- viii. The elements of the Defendants' counterclaims;
- ix. The affirmative defenses asserted by the Defendants;
- x. The affirmative defenses asserted by the Plaintiff; and
- xi. The Pinto Action.

The Parties may move to amend this discovery plan as is reasonably necessary, including expanding the scope of discovery beyond those issues specifically enumerated herein, subject to the approval of the Court. The Defendants contend that some of the requested discovery should be stayed pending the resolution of its Motion for Summary Judgment.

IV. RULE 26(f) CONFERENCE

Counsel for the Parties conferred by telephone on July 1, 2015 at 10:00 a.m.

V. ADDITIONAL PLEADINGS OR MOTIONS

The Defendants anticipate filing a motion for summary judgment within thirty (30) days of the filing of this pleading. The Motion for Summary Judgment will be based upon among other things the plain language of the Settlement Agreement. To avoid unnecessary expenses, the Defendants will also move to stay discovery and the Trustee will oppose since the Defendants have already taken the Trustee's deposition and will be completing the Trustee's accountant's deposition by months end. The Trustee will oppose the summary judgment and may file a cross motion for summary judgment depending upon the facts developed through discovery.

VI. PARTIES' GOOD FAITH ESTIMATE OF LENGTH OF TRIAL

The Parties estimate that time required for a trial of the claims asserted in this adversary proceeding will be 1-3 days.

VII. PARTIES CONSENT TO FINAL ORDERS AND JUDGMENTS

The Plaintiff consents to the Court's entry of final orders and judgments in this adversary proceeding pursuant to 28 U.S.C. § 157(b)(1). The Defendants do NOT consent to the entry of final orders and judgment in the adversary proceeding. The Defendants filed a Motion to Withdraw Reference which was denied without prejudice and intend to re-file the Motion.

Respectfully Submitted,

MARK G. DEGIACOMO, CHAPTER 7 TRUSTEE
OF THE UPPER CRUST, LLC ET AL.

By his attorneys,

/s/ Kevin F. Yetman

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Dated: July 20, 2015

JORDAN AND STEFANY TOBINS,

By their attorneys,

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Dated: July 20, 2015

CERTIFICATE OF SERVICE

I, Kevin F. Yetman, hereby certify that this document was filed through the Court's ECF System and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Kevin F. Yetman